pense or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to expose them where it would be inequitable having regard to the dealings which have thus taken place between the parties." *per* Lord Cairns at page 448. Thus the rule in *Hughes'* case depends on a representation of intention as distinguished from the doctrine of estoppel which is based on a representation of existing fact — see *Jorden* v. *Money.*[10] The further striking difference between the two doctrines is that the effect of the doctrine in *Hughes'* case is only to suspend rights, while estoppel operates extinctively, if at all. I do not think here it can rightly be said that the doctrine of estoppel comes into play so as to be expressly pleaded.

The equitable doctrine of forbearance to insist upon the strict rights under the contract can be repudiated by the party granting it provided that he gives reasonable notice of his intention to do so to the other party for whose benefit it was originally granted. Thus, in *Charles Rickards Ltd.* v. *Oppenhaim*[11] a contract for the sale of a car provided for delivery on March 20. The car was not delivered on that day but the buyer continued to press for delivery and finally told the seller on June 29 that he must have the car by July 25 at the latest. It was held that the buyer could not have refused peremptorily to accept the car merely because the original delivery date had done by, as he had continued to press for delivery. But he could refuse on giving the seller notice to deliver within a reasonable time. Here the notice did give the seller a reasonable time to deliver, so that the buyer was justified in refusing to take the car after July 25. Of course, events may happen which make it impossible to retract a forbearance. In *Leather Cloth Co.* v. *Hieronimus*[12] the buyer could not have retracted his agreement to shipment via Rotterdam after the goods had been lost. A buyer of goods to be shipped via Ostend agreed to shipment via Rotterdam. He was held liable for the price, though the goods were lost, as he had assented to the altered mode of performance. In this case there is no variation of the contract, but only a variation of the mode of performance; or that there is no variation, but only a waiver of forbearance.

On the facts of the present case the learned judge considered and determined that no adequate notice to the appellant to revert to his original position had been given. With that proposition I fully agree. The appellant wholly relied on the representation of the respondent that he would be supplied with essential building materials and it would be inequitable for the latter to go back on that representation unless adequate notice was given to revert to the *status quo.* What is adequate notice is a question of fact and that is essentially a matter for the trial judge.

Appeal allowed. Cross-appeal dismissed.

Solicitors: *Ee Lim & Leong.*

MURUGASU v. MICHAEL CHONG NGIAN FONG

[F.C. (Gill C.J., Ong Hock Sim and Raja Azlan Shah F.JJ.) May 27, 30, 31 and July 29, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 17 of 1976]

Contract — Oral agreement for sale of land and houses — Breach by purchaser — Agreement terminated by vendor — Subsequent purchase of land and houses by purchaser — Rent collected by vendor after purchase but before transfer — Payable to purchaser.

This was an appeal against the decision of the High Court dismissing the claim of the appellant against the respondent and giving judgment against him on the respondent's counterclaim. The appellant alleged that there had been an oral agreement for the sale of certain land and houses to the respondent. The agreement was that the purchase price should be paid by a certain date. On failure of the respondent to comply with this condition, the appellant said the deal was off. Subsequently the respondent agreed to take over the houses and the houses were transferred to him. Rents had been collected by the appellant from the tenants of the houses after the date of sale until the date of transfer. The learned trial judge held that the respondent was entitled to the rents.

Held: (1) the claim of the appellant was rightly dismissed by the learned trial judge;

(2) the learned trial judge was correct in finding that the appellant had collected the rents of the houses and that he should account for them to the respondent.

Cases referred to:-

(1) *Re Lyne* v. *Stevenson* [1921] Ch. D. 472.

(2) *In re Thackwray and Young Contract* (1889) 40 Ch. D. 34.

(3) *Shaw* v. *Foster* L.R. 5 H.L. 321, 338.

(4) *In re Lyne-Stephens and Scott Miller's Contract* [1920] 1 Ch. D. 477, 478, 480.

(5) *Davies* v. *Little-John* (1923-24) 34 C.L.R. 174.

(6) *Poh Kim Kang* v. *Ishak b. Lambik* [1971] 2 M.L.J. 251, 252.

FEDERAL COURT.

S.D.K. Peddie for the appellant.

R.R. Chelliah (*N. Ramachandran* with him) for the respondent.

Gill C.J. (Malaya): This is an appeal by the plaintiff from the decision of Wan Suleiman F.J. in the High Court at Seremban dismissing his claim against the respondent as defendant in the action and entering judgment against him on the defendant's counter-claim.

The plaintiff's claim was founded on an oral agreement, which he alleged was made on May 29, 1965, for the sale by him to the defendant of 26 houses on new sub-lots on his land previously held under Grant No. 4485 for Lot No. 517 in the town of Seremban. The events leading up to the making of the alleged oral contract are stated in the plaintiff's statement of claim as follows.

On or about April 14, 1964 the plaintiff in consideration of $1 paid to him granted to the defendant an option until 12 noon on April 20, 1964 for the sale of all but ten of the houses that he was constructing on the land in question with moneys borrowed from the Great Eastern Life Assurance Company Limited. The agreed purchase price was to be $1,310,000 of which a sum of $250,000 was to be paid upon acceptance by the option. A further sum of $450,000 was to be paid on or before July 1, 1964 and the balance of $610,000 upon construction of all the houses.

Having failed to exercise his right under the option before it expired, the defendant called on the plaintiff on April 21, 1964 with a cheque dated the same date for $110,000 in plaintiff's favour drawn on the Seremban branch of the Oriental Bank of Malaya Limited, and by word of mouth requested the plaintiff to sign 40 sets of agreement for sale, each in triplicate leaving the names and addresses of intending purchasers and also the date in blank, assuring the plaintiff that not only would the said cheque be met but that he would also pay a further sum of $130,000 within seven days. Upon the said verbal assurance the plaintiff acceded to the defendant's request and signed the agreements as requested, after which the defendant handed the said cheque to the plaintiff and left with the agreements.

The cheque when presented to the bank by the plaintiff was returned dishonoured with the remarks "payment stopped". The plaintiff immediately called at the defendant's office, gave verbal notice of the dishonour and demanded for the return of all the 40 sets of agreements, with which demand the defendant agreed to comply after consulting his alleged clients, which he said were a syndicate, within the next day or two.

On May 1, 1964 the defendant called on the plaintiff at his house and verbally requested him to allow the defendant to sell the houses. He produced a cheque for $38,500 drawn on the same bank in favour of the plaintiff, assuring him that it would be met, that further payments would be forthcoming from time to time and that stamped copies of the agreements would be furnished to him from time to time for his records.

The defendant made further payments to the plaintiff from time to time, but did not furnish the stamped copies as agreed, though repeatedly requested to do so. As payments were not being made regularly as agreed, and as some of the purchasers including the defendant's wife Gan Sue Moy called off the transaction and had their respective deposits returned by the plaintiff, on May 29, 1965 the plaintiff and the defendant varied their previous verbal agreement and confirmed the sale to the defendant or his assigns or nominees of 24 houses at $28,000 each and 2 houses at $29,000 each, making a total of 26 houses for a total sum of $730,000. Upon accounts being taken as on that date a sum of $542,456.96 was found due from the defendant to the plaintiff which he agreed to settle at once but which he failed to do, although he made certain further payments to account. According to the accounts as on May 17, 1970 a sum of $373,965.08 inclusive of interest was due from the defendant.

In the last paragraph of his statement of claim the plaintiff averred that he had been ready and willing to perform his part of the obligation at all material times, but that the defendant by his conduct and issuance of dud cheques from time to time had allowed the plaintiff's claim with accruing interest to accumulate and had further failed or neglected to complete the said purchase on May 29, 1965 or within a reasonable time thereafter. He therefore claimed for specific performance of the said agreement, all necessary and consequential accounts, directions and inquiries and damages for breach of contract in lieu of or in addition to specific performance.

In his statement of defence the defendant admitted that part of the statement of claim which related to the granting of the option of April 14, 1964 but denied the rest of it in toto. His case as set out in the statement of defence and on the basis of which he raised his counter-claim was as follows.

After the expiry of the option he agreed to act as broker for the plaintiff of the sale of the subdivided lots. On the instructions of the plaintiff he prepared sale agreements the terms of which were settled by the plaintiff. During the months of May and June 1964 he found purchasers who, together with the plaintiff, signed the agreements in his office. One of the terms of the agreements was that the plaintiff should complete the house and give possession to each purchaser by September 1, 1964 to enable it to be leased to the British Military as from that date. In the event of the plaintiff's failure to do so, he was to pay damages at the rate of $225 a month as from that date until completion and delivery.

By September 1, 1964 about 20 of the houses had not been completed, so that the plaintiff became liable to pay damages to the respective purchasers. In order to evade the liability to pay damages, the plaintiff falsely alleged that the Military had refused to take the leases and sought to terminate the agreement and refund the money received. Most of the purchasers refused to accept the refund and instituted proceedings against the plaintiff for damages. He refused to cooperate with the plaintiff in fighting the purchasers, whereupon the plaintiff terminated his services and threatened to report him to the Bar Committee for alleged misconduct in acting as a broker. The plaintiff did in fact lodge a complaint to the Bar Committee on January 10, 1966.

Under the mistaken belief that it was unprofessional for him as solicitor to act as a broker and fearing the consequences of any disciplinary proceedings against him, he sought to persuade the plaintiff to withdraw his complaint. The plaintiff demanded that he take over the purchase of 26 houses from the original purchasers and pay the plaintiff the sum of $455,000 which he alleged was due to him as the balance of the purchase price after crediting all payments already made. He agreed to purchase the 26 houses on those terms in or about December 1966, and the plaintiff agreed to transfer the houses to him free from all encumbrances.

In pursuance of that agreement he paid a sum of $350,000 to the plaintiff's then solicitors, Saraswathy Devi & Company, on or about January 9, 1968. The plaintiff executed a memorandum of transfer of the said 26 houses to him and deposited it with Saraswathy Devi who undertook to release it as soon as he had bought the rights of the original purchasers. As a balance of $105,000 was still due, it was agreed that the plaintiff should collect the rent from the houses until that sum was set off. As security for repay-

ment of the said sum he executed a retransfer of 10 of the houses on the understanding that Saraswathy Devi should keep the document until the said sum was set off and then return it to him. All this arrangement was recorded in a document in the form of an undertaking which was signed by Saraswathy Devi and countersigned by him, the plaintiff and Seah Choon Chye as solicitor for Bank Bumiputra.

On May 13, 1968 he paid the plaintiff a sum of $27,004 towards the balance of the purchase price. By March 1, 1969 the whole of the purchase price due to the plaintiff had been paid or set off. By September 1, 1970 he had bought over the rights of all the original purchasers except two. In order to enable Saraswathy Devi to comply with the undertaking dated 9, 1968, he deposited with her a sum of $16,000 to cover the claims of the two reluctant purchasers and obtained from her a memorandum of transfer of the said 26 houses which was registered a few days later. There was thus no sum due from him to the plaintiff.

In the last paragraph of his statement of defence the defendant repeated what he had alleged in the earlier paragraphs of his defence, and by way of counter-claim claimed from the plaintiff a sum of $101,250 being the total of all moneys collected by him by way of rent on 25 of the 26 houses at the rate of $225 per house per month for a period of 18 months from March 1, 1969 to August 31, 1970.

At the trial of the action, in his examination-in-chief the plaintiff made no mention of the alleged oral contract of May 29, 1965 which was the very basis of his claim. The only thing he said about the 26 houses was that when he handed the refund of deposit to defendant's wife on April 27, 1965, the defendant said that he would collect the remainder of the money due on the 26 houses within two days. He then stated as follows as to how the number of houses involved became 26:

"When I refunded her deposit to defendant's wife, I asked him to help straighten our records. Defendants told me he had received various sums as advance payment for 36 houses from 36 people. At his request I refunded the deposits of 6 persons, including his wife, leaving 30 houses for which advances had been paid. I also asked him to refund the payments in respect of 2 houses which I had earlier told him not to sell. He agreed to do so. That left 28 houses.

Defendant then said he received $6,000 from one Selvarasan of Kuala Lumpur, whom I did not know. I asked him to refund that money. I also transferred a lot to one Sivarajah, as I had said yesterday. That left 26 houses for which defendant had collected advance payments."

Under cross-examination, however, he said that he terminated the defendant's services as a broker, because he was unsatisfactory in that capacity, on May 29, 1965 when the defendant agreed to purchase the houses himself and to pay the balance due within 10 days. The agreement was oral, and as far as he could remember there were no other terms. He went on to say that when the defendant did not pay the balance due as agreed he told the defendant that the deal was off, although he could not remember if he informed the defendant orally or in writing. By June 9, 1965 there was no longer any agreement to sell the 26 lots to the defendant.

The plaintiff next said that some time in 1967 the defendant approached him and asked him for another chance to purchase the same 26 houses. He agreed and again the agreement was oral. About five months later the "Undertaking" was drawn up, the terms of which, however, were not in accordance with the terms he had discussed with the defendant in 1967 when they had agreed that he would sell 24 houses at $28,000 each and 2 houses at $29,000 each. Under the agreement he was to credit whatever the defendant had already paid him to his account and the defendant was to pay interest on the balance due on the previous agreement of May 29, 1965. As regards the Undertaking, he first said that he did not agree that it was drawn up in order to settle all matters between him and the defendant, denying that there was any meeting between himself, Saraswathy Devi and the defendant before he signed the Undertaking, although he read it and agreed with the terms recorded therein.

Under further cross-examination he stated as follows:

"In mid 1976 defendant agreed to purchase the 26 houses on the terms I mentioned yesterday. It was also agreed that he would buy off the persons who were suing me in respect of some of the houses. It was also agreed that he was to pay me $511,825.90 within ten days. If he had settled within ten days I would have waived interest. We did not talk about interest that day. It is untrue that the amount was $455,000. I would then have transferred the 26 houses to him free of encumbrances."

Eventually he agreed that the Undertaking recorded accurately the terms of the sale of the 26 houses from him to the defendant. He next said that he agreed that the sum of $455,000 set out in paragraph (g) of the Undertaking was the correct amount due to him from the defendant and that on that date the defendant had paid him $350,000 in two cheques leaving a balance of $105,000. He agreed that the defendant paid him $27,004 on May 13, 1968 and he thought that it was agreed that this sum would be set off against the sum of $105,000. However, he maintained that he had never authorised the transfer to the defendant at all and that if there had been a transfer it was without his knowledge. He further maintained that the retransfer was not merely to provide him with security.

He concluded his cross-examination by stating as follows. He had been collecting rents on all 26 houses from the time they were built until August 31, 1970. He believed that all 26 houses had been built by the date of the Undertaking. At first the Military paid $285 per month but later reduced to it $225. He could not say how much he had collected in rent up to August 31, 1970 so that he could not say if he had collected $101,250. From September 1, 1970 the tenants began to pay rents to the defendant.

What the plaintiff said in re-examination may be summarised as follows. He was prepared to pay rent as stipulated in clause 2 of the standard agreement once a purchaser had paid a deposit of $6,000. He was ready and willing to perform his obligation to the purchasers but he directed Saraswathy Devi to defend the actions filed by them because the total claimed to have been paid to him amounted to more than the total paid to him by the defendant. He must have told the defendant that he was going to complain about him to the Bar Council, but he did so

not to pressurize the defendant into purchasing the 26 houses. The defendant had agreed to purchase the houses on May 29, 1965 and not in December 1966 as suggested in the defence. As from September 1970 the defendant had been collecting rents without his permission from the 10 houses which were the subject matter of the re-transfer mentioned in the Undertaking, there being no mention in the Undertaking that the defendant could collect the rents. On the basis of the Undertaking a sum of $73,271.26 was still owed by the defendant as the balance of the purchase price.

The defendant's evidence in court was a restatement on oath of what he had stated in his statement of defence. What he said in his examination-in-chief may be summarised as follows. After being unable to exercise the option because the plaintiff was unable to produce the title to the land so that the syndicate which was proposing to buy the plaintiff's land was no longer interested in it, he agreed at the plaintiff's request to sell the houses as a broker on a commission basis. The plaintiff handed him a copy of the proposed lease agreement by him with the Military and asked him to draw a draft agreement which he would enter into with the would-be purchasers. In preparing the agreement he was acting as the plaintiff's solicitor. Thereafter whenever a prospective purchaser came to his office he would introduce him to the plaintiff. As soon as an agreement was signed a deposit of $6,000 was paid to him. He would pay such sum into his bank, deduct commission and when the cheque was cleared he would pay the balance to the plaintiff. In this way he sold 35 to 36 lots within the space of a few weeks. The purchase price was $28,000 and sometimes $29,000. Various other sums were paid to the plaintiff by way of interest, survey charges and insurance, the interest being due for payment by the plaintiff to the Great Eastern Life Assurance Co. on loans which the plaintiff had undertaken to obtain on behalf of purchasers as provided in the agreement. At the time of sale no loan of $15,000 had in fact been raised on behalf of purchasers. According to clause 2 of the agreement one year's rental of $3,420 at $285 per month payable in advance by the Director of Lands Headquarters Far East Land Forces was to be credited to the purchasers' purchase price.

Some time in early September 1964 some of the buyers came to see him with letters they had received from Kamala Devi & Co. acting on behalf of the plaintiff. There were at least 16 such letters and they were couched in similar terms as the following:

"Our client instructs us that for circumstances beyond his control the Military have declined to take any building on Lot No. 7618 in the District of Seremban.

We refer you to clause 11 of the agreement dated June 11, 1964 made between K. Murugasu of the one part and yourself of the other part and we hereby refund to you the sum of $6,000 being the deposit paid together with interest (at 10% from the date of the said agreement) of $133.34 by way of Chartered Bank Cheque No. P. 488559."

To his knowledge what was stated in the letters was incorrect because the Military had not refused to take those houses, so that the plaintiff was not entitled to act under clause 11 of the agreement. The buyers wanted him to act for them as their solicitor but he declined because he was then acting both as solicitor as well as broker for the plaintiff. The plaintiff agreed to refund the deposits with interest. Some of the purchasers agreed but others asked for double the amount they had paid as damages in accordance with clause 7 of the agreement. Upon the plaintiff's failure to agree to pay double the amount, they instituted proceedings in the High Court. When this happened the plaintiff came to see him and asked him to persuade such people to accept a refund of their deposits. He refused to do so. Soon after that he received a letter from Kamala Devi & Co. terminating his services as solicitor.

It was untrue that he agreed either on May 29, 1965 or at any other time in the same year to buy 26 houses from the plaintiff, nor had he at any time in 1965 any intention of buying any houses. By the end of 1965, when he refused to co-operate with the plaintiff in persuading the purchasers to accept refunds of their deposits, the plaintiff threatened to report him to the Bar Council, alleging that he had acted unethically as a broker. At that time he was not very sure whether it was unethical for a solicitor to act as a broker. The plaintiff carried out his threat by sending to the Bar Council a letter dated January 10, 1966 complaining against him that he had acted as broker, that he had collected various sums of money on plaintiff's behalf and that he had committed criminal breach of trust, there being no suggestion in the letter that he had bought those houses at any time during 1965.

The plaintiff's letter caused him to panic. He was terrified and sought the help of the plaintiff to avoid further disciplinary proceedings by withdrawing the complaint. He also saw Saraswathy Devi, the then solicitor for the plaintiff. By then the plaintiff had engaged Dato' Seenivasagam. He also saw Dato' Seenivasagam who advised him to settle the matter by purchasing the houses. What Dato' Seenivasagam said to him also made him believe that being a broker was a serious misconduct for a solicitor. He told Dato' Seenivasagam that he was in no position to buy the houses but that he would try to obtain a loan. The plaintiff agreed to withdraw the complaint if he purchased the 26 houses and the rights of all those who have filed actions against him. He did not have sufficient money. He told the plaintiff that he would purchase the houses if he could raise a loan. That was some time in December 1966.

He then applied to Bank Bumiputra for a loan. The negotiations took several months. All that time he was under pressure from the plaintiff who kept on seeing him and also wrote to him on the matter. Between December 1966 and June 1967 he visited Bank Bumiputra on a number of occasions, sometimes accompanied by the plaintiff who knew the Bank Manager quite well and knew of his application for the loan. The plaintiff confirmed to the bank that he was purchasing the 26 houses. His original application was for $350,000 but later he asked for $450,000. The plaintiff assured the Bank Manager that he would release the 26 titles as security for the loan.

A few days before the end of June 1967 he was informed that his loan had been approved. The bank manager told him that he could proceed with the transaction and that he could draw up to $450,000 from the bank. On hearing this he went to see the plaintiff and told him that the loan had been approved and that they could proceed with the transaction. They then considered the figures and he agreed to purchase the 26 houses free from encumbrances for a total sum of $676,000 at $26,000 per house. He was to be given credit for the sum of $221,000 which had already been paid by the purchasers. He had also to purchase the rights of the persons who had entered into agreements and had filed suits against the plaintiff. The market price of the houses was then $20,000 because by mid-June 1967 the British Military were about to pull out from the country, as a result of which there would be many houses vacant. Moreover, it would not be possible to get a rent of $285 a month after the Military left. He made a check at the Land Office if there had been sales of any of the houses around 1968. There were two sales by the plaintiff, one for $20,000 and the other for $22,000. The 26 houses and the 2 which were sold were from an area called "Murugasu Gardens". He agreed to buy at $26,000 because of the complaint to the Bar Council.

He continued to press the bank for a loan. Early in November 1967 he received information that the bank had finally approved a loan of $300,000 and not $405,000. He then rushed around to get other loans and was able to get a loan of $40,000 which he deposited with Saraswathy Devi. After that negotiations took place in the office of Saraswathy Devi. They finally arrived at an agreement on January 9, 1968 when the Undertaking was drawn up and delivered by Saraswathy Devi as plaintiff's solicitor to Seah Choon Chye as solicitor for the bank.

The first paragraph of the Undertaking was for Saraswathy Devi and Seah Choon Chye to release the transfer which had been signed by the plaintiff on that date. The 15 lots mentioned in paragraph (a) of the Undertaking had been sold to 15 purchasers who had filed suits against the plaintiff claiming damages. He was required to settle all those claims and obtain from the purchasers their rights under the agreements. In other words, he was to buy off their rights. The claim in respect of Lots 7601 and 7602 mentioned in paragraph (d) of the Undertaking was $16,000. He agreed to deposit that sum with Saraswathy Devi in the event of the purchasers obtaining judgment against the plaintiff.

As stated in paragraph (g) of the Undertaking, he was then still owing the plaintiff $105,000. This amount was to be set off against rents obtained by the plaintiff from 25 houses as he was staying in one of the houses included in the agreement. The plaintiff in fact collected rent from the 25 houses. He had gone to see the 25 houses before January 9, 1968 when 8 to 10 of them were occupied by the Military personnel and the rest by civilians. There were four or five empty houses for a short while. Some of the Military tenants told him that they were paying rent of $285 per month. The civilian tenants said that they were paying $275 per month. Sometime in May 1968 he paid the plaintiff a further sum of $27,004 to enable him to obtain a discharge from the Great Eastern Life Assurance Company, thus leaving a balance of $77,996 due from him.

The defendant was cross-examined at great length but the evidence which he gave in the course of his examination-in-chief remained unshaken. What he said under cross-examination was as follows. The plaintiff told him that he would get individual loans for the purchasers and that as each house was completed it was to be let to the Military and the rent passed on to the purchaser. Some time in 1967 he told Dato' Seenivasagam, who then represented the plaintiff, that he would purchase the houses if he was able to get a loan from a bank. The complaint to the Bar Committee was still hanging over his head. Prior to this he had been doing his best to get the parties together to come to a settlement but his efforts failed because from September 1, 1964 the plaintiff had refused to credit rents received by him to account of the purchasers. The sum agreed upon between him and the plaintiff as balance of the purchase price in December 1966 was $455,000 and the plaintiff undertook after such payment to transfer the 26 houses to him.

It was agreed at the time the undertaking was executed that rents were to be set off against amounts owed by him to the plaintiff. He did insist that this term should be included in the undertaking but Saraswathy Devi and the plaintiff replied that such a condition was understood. He collected rent on one house with plaintiff's agreement because he had spent $5,000 on repairs to 3 houses. The retransfer under paragraph (g) of the undertaking was to enable the plaintiff to have security for the amount which was still owing to him. Apart from other considerations, paragraph 2 of the standard agreement with purchasers supported his claim that rents were agreed to be set off against his debt to the plaintiff. He collected rents from the 26 houses from September 1, 1970 because by that date the plaintiff had not only been paid all sums due to him but had over-collected. Except for the house which he occupied the rents of the other 25 houses were $225 per month per house when the military pulled out, making a total of $5,625 a month.

In re-examination the defendant said that most of the houses were completed in mid-September to end of December 1964. From the time of their completion to August 31, 1970, plaintiff collected and retained the rents for those houses. None of the purchasers was given any credit for the rents so collected, not even under clause 2 of the standard agreement. The defendant then wound up his case by testifying as follows:

"By January 9, 1968 it had long been agreed that I owed plaintiff $455,000. By that day I had paid by cheque and bank draft a total of $350,000 to Saraswathy Devi. Plaintiff executed transfers for the 26 houses and left them with Saraswathy Devi that day. The balance of $105,000 it was agreed was to be set off from rents collected by plaintiff. No definite period was agreed for such rent collected but was envisaged such period to be 14 to 15 months and I executed re-transfers of ten houses that day. These memoranda of transfers I executed were to be held by Saraswathy Devi

during such period — *i.e.*, until the set-off had been completed. On my part I had to ensure withdrawal of the suits and obtain the assignments mentioned in Undertaking. Apart from that there was nothing else for me to do. Saraswathy Devi would not release the transfers signed by plaintiff until I had obtained the assignments and secured withdrawals. It would be to my advantage to get all these assignments and withdrawals, and I tried to do so.

In my view I became the owner of the houses from the date of the Undertaking. The transfer forms of the 26 houses were signed both by me and by the plaintiff on January 9, 1968. I cannot remember if they bore dates. I say I am owner as from January 9, 1968 because I had paid all but $105,000 of purchase price, despite the fact that it had not been registered in my name — I had then paid a total of $571,000, out of which $221,000 had been paid to plaintiff as on page 9 of Statement of Claim *i.e.*, in 1964 and 1965. Up to January 9, 1968 I had obtained no benefit for myself from the 26 houses. The plaintiff had been collecting rents from 1964. All I had as security was the Undertaking.

But for the complaint to the Bar Committee, I would not have purchased these 26 houses."

Kharuddin bin Abdul Aziz (DW2), Deputy Commissioner of Lands Negeri Sembilan as well as Deputy Registrar of Titles, gave evidence on behalf of the defendant regarding the various titles and as regards caveats lodged against such titles. K. Raja Nayagam (DW3), an advocate and solicitor, gave evidence about the 17 civil suits which he had filed against the plaintiff on behalf of the purchasers, and about the caveats which his clients had lodged against 12 lots in respect of which suits had been filed in 1965. He further testified that some time in August 1970 the defendant arrived at a settlement with all his clients. He said that an agreement had in fact been reached earlier to pay a lump sum of $180,000 in respect of 18 agreements and his clients had agreed to assign to the defendant their rights under their agreements and to withdraw 17 civil suits filed by him, his 18th client not having filed a suit. By August 29, 1970 all his 18 clients had assigned their rights to the defendant. He denied that he had conspired with the defendant, Saraswathy Devi and Seah Choon Chye to defraud the plaintiff as alleged by the plaintiff.

Perhaps I should mention that whilst the defendant was under examination-in-chief the plaintiff's solicitor applied to amend the amended statement of claim by adding a sub-paragraph (ii) to paragraph 9 to the effect that "that such oral agreement was again varied by an undertaking dated January 9, 1968 by the defendant *inter alia* to transfer ten of the 26 houses aforesaid subject to a charge created by him in favour of Bank Bumiputra Berhad for $107,000 to be redeemed by the plaintiff." This also necessitated the consequential amendment to prayer 1. This proposed amendment was disallowed by the learned trial judge on the ground that to allow it would be tantamount to allowing the plaintiff to set up a fresh claim in respect of a cause of action which had become time-barred since the issue of the writ.

At the end of the trial, after counsel for the parties had delivered written submissions, a further application was made to amend the statement of claim, this time by adding a new paragraph 10(ii) which again was based on the undertaking, giving particulars of fraud on the part of the defendant and seeking to add a prayer for the specific performance not only of the agreement originally alleged but also of the undertaking. This application was also rejected on the same ground as it was similar to the one made earlier.

I would pause here to observe that I have dealt at considerable length with the evidence in this case because the trial of the action took 31 days and a mass of evidence was produced because of the lengthy cross-examination of the plaintiff and the defendant. Much of the evidence, however, as stated by counsel for the appellant at the very outset of his submissions, was irrelevant. On the other hand, counsel for the respondent stated before us at the commencement of his submissions that one had to go back to 1964 to understand the relationship between the parties.

In the light of all the evidence before him and the submissions made by learned counsel on behalf of the parties, the learned trial judge dealt with the case on the basis that, as far as the plaintiff's claim was concerned, it was a claim for specific performance of an alleged oral agreement made between the parties on May 29, 1965 for the sale of 24 houses at $28,000 each and 2 houses at $29,000 each. The plaintiff made no reference to this agreement in any of his correspondence with anybody between May 29, 1965 and January 9, 1968. The alleged agreement was conditional on the defendant paying the full purchase price within 10 days. As no such payment was made within the stipulated period, the plaintiff told the defendant that the deal was off so that by June 9, 1965 there was no longer any agreement between them for the sale of the 26 houses. On the plaintiff's own admission alone, therefore, his claim could not succeed. The plaintiff alleged a later oral agreement between him and the defendant some time between August or September 1967 for the purchase of the same 26 houses, the terms of which he said were not the same as those of the undertaking given on January 9, 1968. This agreement, however, was not and could not be the basis of the plaintiff's claim in the action. In the result the learned judge dismissed the claim.

It is to be observed that there is in effect no appeal from the dismissal of the plaintiff's claim because counsel for the appellant agreed that he was prepared to argue the appeal on the basis that the only agreement between the parties for the sale of the 26 houses was as alleged by the defendant. As the plaintiff was collecting rents up to August 31, 1970, there cannot possibly be any amount due to him under that agreement even if he was entitled to interest on what was due to him on January 9, 1968, so that even on that basis his claim was rightly dismissed.

That brings me to the defendant's counter-claim which is founded on that agreement. The learned trial judge dealt with it in this way. The agreed purchase price at $26,000 per house was $676,000. The defendant was given credit for the sum of $221,000 already paid, and he paid a sum of $350,000 on the date of the undertaking, leaving a balance of $105,000. The plaintiff executed a memorandum of transfer of the 26 houses to the defendant and deposited it with Saraswathy Devi who was to release it to Seah Choon Chye on behalf of the defendant as soon as the defendant purchased the rights of the original purchasers and had their civil suits against the plaintiff withdrawn. The plaintiff was to collect the rent which

was to be set off against the sum of $105,000 due to him. As security for the payment of that sum until it was set off the defendant executed a re-transfer of 10 houses to the plaintiff, which was deposited with Saraswathy Devi to be held by her until the set-off was completed. The houses were sold not with vacant possession but subject to the leases under which rents were payable so that the defendant was entitled to such rents as from January 9, 1968. (See in *Re Lyne* v. *Stevenson*[1]). By August 29, 1970 the original purchasers had been paid all amounts due to them inclusive of compensation, and they had withdrawn their civil suits against the plaintiff and assigned their rights to the defendant. Even if the plaintiff was collecting rent at the reduced rate of $225 a month the balance due to him had been set off by February 28, 1969. The plaintiff continued to collect rent until August 31, 1970 so that he had collected a sum of $101,250 which became due and payable to the defendant. Accordingly the learned judge gave judgment for that amount.

One of the grounds of appeal is that the learned judge should have permitted the plaintiff to amend his statement of claim so as to plead therein the 1968 undertaking. In my opinion, allowing the plaintiff to amend his claim would have made no difference to the case as his evidence was that the undertaking did not record accurately the terms of the agreement. As counsel for the plaintiff submitted, the undertaking conferred no rights on either party. It was also contended by counsel for the appellant that the learned judge was wrong in stating that the right to deduction of rents came from the undertaking as there was no mention of it therein. I agree that there was no mention as regards deduction of rents in the undertaking, but the defendant was clearly entitled to rents under the law and he gave evidence that that was the agreement between the parties. As the learned judge has stated in his judgment, the undertaking merely finalised the matter between the parties.

It is submitted on behalf of the appellant that the hypothetical debiting of the rent of $225 a month against the plaintiff was wrong and that the taking of proper accounts should have been ordered so as to ascertain what rents the plaintiff had been collecting. A short answer to this contention is that the plaintiff himself said that he had no accounts other than the very meagre accounts which he had produced at the trial of the action. No purpose therefore would have been served if an order for the taking of accounts had been made.

The main ground of appeal is that the respondent in claiming benefits on account of rents received by the appellant must also accept liability in respect of interest and other charges such as repairs. But the appellant gave no evidence of his having spent any money on repairs to any of the houses. As regards interest, it is submitted that if rent is to be set-off, then equity would compel interest to be paid on the outstanding balance.

In my judgment, equity in all the circumstances of this case is on the respondent's side for the following reasons. The respondent himself did not claim any interest on the rents which the appellant had been collecting for the period March 1, 1969 to August 31, 1970. By obtaining assignments of the rights of the original purchasers under their agreements with the appellant the respondent stepped into their shoes. Had the appellant not repudiated those agreements by falsely and perhaps fraudulently alleging that the Military were not going to rent the houses, the purchasers would have become entitled to the rents as from September 1964 or soon thereafter. For more than three years, therefore, the appellant had been collecting rents to which he would not have been entitled had he honoured his agreements with the original purchasers. The respondent in fact said that he would forego rents until the date of the undertaking. He paid nearly $200,000 to buy off the rights of the original purchasers. His evidence that but for the complaint against him to the Bar Council he would not have purchased the 26 houses stood unshaken, so also his evidence that at the time of the undertaking the houses were not worth more than $22,000 each.

In my judgment, for the reasons I have stated, the learned judge was quite right in dismissing the claim and entering judgment on the counter-claim. I would dismiss the appeal with costs.

Ong Hock Sim F.J. (read by Gill C.J. (Malaya)): I have read the judgment in draft of the learned Chief Justice and respectfully agree that this appeal be dismissed.

I do not propose to set out the background and evidence recorded in the action which has been fully and carefully dealt with in his judgment by the Chief Justice.

Essentially the action was founded on an alleged oral agreement made on May 29, 1965 for the sale of 26 houses to respondent. This is stated in paragraph 9 of the statement of claim which I now reproduce: —

"9. The defendant did make further payments to the plaintiff from time to time, but did not furnish stamped copies as aforesaid though repeatedly requested and as the said payments were not being made as agreed regularly and further as some of the purchasers called off the transaction with their respective deposits returned by the plaintiff as and when demanded, including that of the defendant's wife named Gan Surt Moy, on May 29, 1968 the Plaintiff and the defendant varied the said verbal agreement and confirmed the sale of 26 houses to the defendant or his assigns or nominees *i.e.*, 24 houses at $28,000 each and 2 houses at $29,000 each making a total of $730,000, whereupon a sum of $542,456.96 was found due from the defendant to the plaintiff upon taking accounts, which he agreed to settle at once, but to-date has failed to do so in full although certain further payments to account had been made. Particulars of account showing how the defendant is indebted to the plaintiff in the sum of $373,960.08 as at May 17, 1970 plus daily interest accruing at the rate of $103.88 exceed 3 folios and will be served on the defendant with the Writ of Summons accompanied by the Statement of Claim herein."

As the learned judge found: —

"The plaintiff is claiming specific performance of an alleged oral agreement made on May 29, 1965 between the parties for the sale of 25 houses at $28.000 each and 2 houses at $29,000 each.

As learned counsel for the defendant rightly submitted he did not make any reference to this agreement in any of his January 9, 1968. The alleged agreement of May 29, 1965 was conditional on the defendant paying the full purchase

price within ten days. The defendant having according to plaintiff failed to do so he had told him that the deal was off so that by June 9, 1965 there was no longer any agreement with the defendant to sell him the 26 houses. Therefore on his evidence alone his claim for specific performance of the alleged oral agreement of May 29, 1965 must fail. Accordingly I dismiss his claim."

I have no reason to doubt the correctness of his conclusion upon the evidence before him.

At the appeal, counsel for the appellant conceded that there was a mass of irrelevant evidence introduced and that the action properly should be one based on vendor-purchaser relationship. To that end, he was prepared to accept paragraph 12 of the Amended Defence and Counter-claim that the respondent agreed in about December 1966 to purchase the 26 houses. It seems clear to me that "the said terms" of the purchase mentioned in paragraph 12 were as those set out in paragraph 11(a) and (b) namely, the defendant: —

(a) should take over the purchase of the 26 houses from the original purchasers and

(b) pay to the plaintiff the sum of $455,000 which amount the plaintiff alleged was due to him as the balance of the purchase price after crediting all payments already made to the plaintiff.

Counsel further urged that the only issue is whether the unpaid balance had been paid by the respondent.

The respondent was unable to go ahead until he secured approval of Bank Bumiputra on his loan application sometime in November 1967. On January 9, 1968, an "undertaking" was executed which appears at pages 386-388 of the record. That undertaking was given by one Saraswathy Devi, an advocate and solicitor, for release of the 26 titles subject to certain conditions set out in paragraphs (a) to (g) and consented to by the respondent, one Seah Choon Chye, a lawyer with respondent's firm and the appellant. That undertaking confirmed the balance outstanding as $455,000 and on that date, after release of $350,000 to Skrine & Co., the respondent was still indebted in the sum of $105,000. It was respondent's contention that he questioned Miss Devi about omission of a clause to the effect that that sum was to be set off from the rents collected on the houses by appellant after January 9, 1968 but was told by Miss Devi and the appellant that that was understood.

The 26 houses were transferred to respondent and registered in his name on September 1, 1970 and he has collected the rents as from that date. Prior thereto on his own admission the appellant had been collecting the rents. It is the respondent's contention that calculated on the basis of $225 rental per mensem per house, even allowing for some being vacant, the balance sum of $73,271.26 outstanding as on May 13, 1968 would have been fully set-off by February 28, 1969. In terms of the undertaking, therefore, the appellant was accountable to him in the sum of $101,250 being rents from March 1, 1969 to August 31, 1970. Any interest payable to appellant in respect of the balance of the purchase price is more than off-set by the interest due to respondent in respect of rents collected by the appellant after February 28, 1969.

The appellant asks, however, that the case be remitted for the taking of accounts, as the figure of $225 rental per house was arbitrary. The only accounts produced in court at pages 646-655 of the record made no reference to rentals collected, on his own admission, by the appellant. His evidence is as follows: —

"I have been collecting rents on all 26 houses from the time they were built until August 30, 1970. I believe all 26 houses had been built by date of Undertaking. At first the Military paid $285 per month per house but later reduced it to $225.

I cannot say how much I had collected in rent up to August 30, 1970, so cannot say if I had collected $101,250."

On the question of entitlement to rents and profits, it is clear that the purchaser takes all the benefits by way of rents and profits and the vendor is only entitled to interest on balance unpaid. [See *In re Thackwray and Young's Contract,*[2] *Shaw* v. *Foster,*[3] *In re Lyne-Stephens and Scott-Miller's Contract*[4]]. Date of completion was January 9, 1968 when security for balance of $105,000 was taken by re-transfer of the 10 houses (see *Davies* v. *Litte-John;*[5] *Poh Kim Kang* v. *Ishak b. Lambik*[6]).

I am of the view, therefore, that it is futile to order a taking of accounts as the appellant obviously kept no accounts of the rents collected. I agree with the learned judge in allowing the counter-claim.

I would dismiss this appeal and confirm the order of the High Court.

Raja Azlan Shah F.J. concurred.

Appeal dismissed.

Solicitors: *Skrine & Co.; N. Ramachandran & Co.*

TEH CHENG POH v. PUBLIC PROSECUTOR

[A.Cr.J. (Arulanandom J.) March 12, 1976]

[Penang — Miscellaneous Criminal Application No. 4 of 1976]

Criminal Law and Procedure — Declaration — Essential (Security Cases) Regulations, 1975 — Subpoena — Federal Constitution.

Constitutional Law — Emergency — Emergency (Essential Powers) Ordinance, 1969 — Essential (Security Cases) Regulations, 1975 — Whether constitutional and valid.

This was an application by way of motion for the following orders: —

(1) The Honourable Court has no jurisdiction to try the applicant under the Essential (Security Cases) Regulations, 1975 and the Essential (Security Cases) (Amendment) Regulations, 1975 as the said regulations are purportedly made under section 2 of the Emergency (Essential Powers) Ordinance No. 1 of 1969 which is null and void and of no effect. The said regulations are accordingly void and inoperative;

(2) The Honourable Court cannot legally try the applicant until there is a preliminary enquiry before a Magistrate in accordance with the provisions of Chapter XVII of the Criminal Procedure Code (F.M.S. 6);

(3) Any further or other order deemed fit by Honourable Court.

The applicant had been charged in the Magistrate's Court, Penang —